IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER
General Counsel

EDWARD R. DUFFY
Associate General Counsel

FRED B. HAUGHT
Assistant Counsel
918 16th Street, N. W.
Washington, D. C. 20006

Attorneys for the National Association of Manufacturers of the United States of America

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

AUTHORITIES CITED

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of this Court, the National Association of Manufacturers of the United States of America respectfully moves this Court for leave to file the accompanying brief in support of the petition by General Motors Corporation for a writ of certiorari in the above-entitled case.

The National Association of Manufacturers is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of more than 15,000 manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises, located throughout the United States and its territories. These concerns range from the very small to the very large and represent about 75 percent

of the industrial employment in the United States. Most of these concerns engage in interstate commerce to some degree, and are therefore subject to various types of state corporation taxes, including franchise taxes.

Counsel for Petitioner, General Motors Corporation, has granted consent to the filing of such brief *amicus curiae*. The Respondent, through its attorney of record, has declined consent.

The Association has an interest in this case by reason of the substantial effect, both immediate and potential, that the decision of the Court of Appeals for the District of Columbia Circuit will have upon the Association's members. The Association seeks to emphasize the far-reaching effect of this decision, to point out certain aspects of previously-decided cases that have not been presented in General Motors' petition, and to demonstrate that the Court of Appeals is setting a standard of proof that is impossible of fulfillment in this and future cases.

We, therefore, urge that leave be granted to file said brief and respectfully so move the Court.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER
General Counsel

EDWARD R. DUFFY,
Associate General Counsel

FRED B. HAUGHT
Assistant Counsel
918 16th Street, N. W.
Washington, D. C. 20006

Attorneys for the National Association of Manufacturers of the United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Association of Manufacturers of the United States of America, with leave of this Court, respectfully presents this brief in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The interest of the National Association of Manufacturers is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.

ARGUMENT

The Court of Appeals based its decision in this case principally upon its interpretation of three cases decided by this Court: *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113 (1920); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959); and *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell,* 283 U.S. 123 (1931). We believe that the Court of Appeals ignored vital aspects of each of these cases.

The Court relied on the *Underwood* case for the proposition that even in a unitary business and under a single-factor formula, the taxpayer must prove arbitrary and unreasonable taxation by precise percentage apportionments. But the lack of evidence in *Underwood* was wholly dissimilar to the alleged lack of evidence here.

In *Underwood* the taxpayer's tangible property in Connecticut was 47 percent of its total tangible property, and Connecticut taxed 47 percent of net profits derived from tangible property. The taxpayer's argument was that it had gross receipts of $1.5 million from rentals, repairs, commissions, etc., on property located outside of Connecticut but manufactured in Connecticut, and that there was no logical connection between its manufacturing facilities in Connecticut and these receipts. (*Underwood Typewriter Co.* v. *Chamberlain,* Brief and Argument on Behalf of the Plaintiff In Error, pp. 16, 32-33; Transcript of Record, pp. 23-

25.) The taxpayer went further: it argued that profits as such from sales of new machines sold outside Connecticut could only be taxed where sold.[1] It argued at length against the application of any "unity rule" of taxation to a manufacturing company (Brief and Argument, *supra*, pp. 42-61), pointing out that its "factory force do not meet the customers at all; and it is of no consequence where the factory is located" (*id.* at 45). The only facts before the trial and appellate courts were those stipulated by both parties, and in these there was no attempt whatever to show double taxation (Brief and Argument of Defendant in Error, pp. 9-22; Transcript of Record, pp. 23-35).

This Court rejected the taxpayer's theory in *Underwood* that there was no connection between manufacture and subsequent transactions involving the manufactured products. Rather, said the Court, profits were directly related to a series of events, beginning with and including manufacture, and *nothing* in the record showed that 47 percent of net income was not attributable to the state of manufacture (*Underwood Typewriter Co.* v. *Chamberlain, supra*, 254 U.S. at 120-121).

---

[1] *E.g.*, "[W]ith respect to sales of new machines manufactured in Connecticut, but sold outside of Connecticut, it is equally apparent that the income earned from such sales received in possession outside of Connecticut and which never reaches the borders of that State, is also properly located without the State. • • • The minute one applies the commercial agencies of selling to the finished product, the resultant profit is attributable only to the processes of sale. • • • Tangibles located without the State of Connecticut cannot possibly have any bearing upon the cost of manufacturing in Connecticut, nor do they in any way have any relation to the value of the finished products in Connecticut." Brief and Argument, *supra*, pp. 33-34, 36, 37.

In the instant case, on the other hand, the single-factor formula is based on sales, not property; it reaches the entire income from every District of Columbia sale, and there are both evidence and findings to the effect that such income is attributable in part to other states and is in fact taxed by other states.

The Court of Appeals relied upon language in *Northwestern States Portland Cement Co.* v. *Minnesota, supra*, 358 U.S. at 462-463, to the effect that the taxpayer must demonstrate burdens on interstate commerce rather than force the Court to deal in abstractions.[2] But the record in *Northwestern States* not only distinguishes that case from this one but helps to demonstrate the difference between an "abstraction," or impermissible hypothetical, and the valid example of double taxation set forth by General Motors.

In the *Northwestern States* companion cases, the taxpayers' real objection was not that the states' three-factor formulae were unfair but rather that the taxpayers had insufficient connections with the states to allow them to be taxed on their purely interstate business.[3] During the course of its argument, however, Northwestern States did say that "The statute in-

---

[2] Appendix to General Motors' Petition, pp. 74a-75a. See also the Court of Appeals' reliance on *Northwestern States* at pp. 59a n. 12, 67a n. 26, and 72a.

[3] For example, in the companion case of *Williams* v. *Stockham Valves and Fittings, Inc.*, decided in the *Northwestern States* opinion, the Supreme Court of Georgia stated: "No question is raised by the plaintiff as to the reasonableness of the apportionment of its net income to Georgia under the prescribed statutory apportionment formula or to the amount of taxes, if liable; but the plaintiff contends that the state is without jurisdiction to impose a net income tax upon a foreign corporation engaged within Georgia in exclusively interstate commerce" (Transcript of Record, p. 30).

volved here is so designed that it *could easily lead* to multiple taxation of interstate commerce, a burden not imposed upon purely local or intrastate commerce" (*Northwestern States Portland Cement Co.* v. *Minnesota*, Brief for the Appellant, p. 13; emphasis added). To support this assertion, Northwestern States asked the Court to assume that instead of being an Iowa corporation doing business in Minnesota, it was a Minnesota corporation doing business in Iowa. It then applied the three-factor formula to its assets, concluded that 99.424 percent of its income would be taxed by Minnesota, and reasoned that "This state of facts clearly demonstrates that a net income tax can be a real burden on interstate commerce" (*id.* at 29; emphasis added).

As pointed out by Minnesota in its reply, however, Northwestern States in this hypothetical not only transposed the facts but incorrectly assigned 100 percent of its sales to Minnesota. Actually, Minnesota, unlike the District of Columbia, allocated sales *to the state in which the office of the origin of the sale was located.* Applying the correct formula, said the State, "would result in a much smaller portion of the total net income assignable to Minnesota than the appellant asserts, and when added to the portions attributable to other states having fair apportionment formulae would result in taxing no more than 100% of the appellant's income" (*id.*, Brief for the Respondent (sic), pp. 39-41).

It was this type of hypothetical abstraction by Northwestern States—removed from the facts of the case and based on questionable assumptions—to which this Court addressed itself in its *Northwestern States* opinion. The hypothetical set forth by General Mo-

tors, on the other hand, illustrates the precise situation confronting the company. It was by proof, and not by an abstraction, that it showed its income being taxed not only by the District but by Delaware, Maryland and Michigan, as the Tax Court found (Appendix to General Motors' Petition, Finding 3, pp. 2a-3a). General Motors does not argue that the District's single-factor formula "could easily lead" to illegal taxation under some other set of facts, but rather that the formula *has led* to multiple taxation and undue burdens on commerce under the specific facts of this case, just as the Tax Court found (Appendix to General Motors' Petition, Findings 3, 5, 6, pp. 2a-4a).

The Court of Appeals distinguished *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, *supra*, 283 U.S. 123, on the ground that there the taxpayer's North Carolina operations "accounted for an identified percentage" of its total net income, and that this evidence was "specific," "tangible," and "concrete" (Appendix to General Motors' Petition, pp. 69a-71a). General Motors, said the Court of Appeals, failed to supply such evidence here.

But the evidence in *Hans Rees' Sons* was never adequately tested by the State, because a ruling by the trial judge made it unnecessary to do so. The evidence consisted of a series of computations based in turn on certain assumptions that may or may not have been permissible (*Hans Rees' Sons, Inc.* v. *North Carolina*, Brief and Argument for Appellant, pp. 18-32). All of this evidence was stricken from the record by the trial judge, who viewed it as immaterial. The North Carolina Supreme Court did not pass on the evidence either, because it too viewed it as immaterial. The Court stated that while the evidence "tends to show" that

the average income having its source in the manufacturing and tanning operations within the State of North Carolina was 17 per cent, the trial judge was correct in striking the evidence because "the tax was computed in accordance with a statutory method which has been approved by the Court of supreme authority," and furthermore, even if the evidence was competent, the taxpayer was "conducting a unitary business" and "it is not permissible to chop off certain elements of the business constituting a single unit, in order to place the income beyond the taxing jurisdiction of this state" (*id.*, Record, pp. 164, 165, 166).

In other words, the North Carolina Supreme Court viewed the single-factor formula as having been approved by this Court in prior cases, regardless of the actual burden imposed by the formula, and also took this Court's language about a "unitary business" to mean that the business could not be broken down by the taxpayer for the purpose of allocating income. Even in this Court, the State did not contest the evidence so much as it relied on the legality of the formula, regardless of its impact.[4]

We stress this point because it is not at all clear that Hans Rees' Sons could have sustained its computations in the face of a full-fledged attack by the State, and it certainly is not clear that henceforth even taxpayers in the position of Hans Rees' Sons can support their allocations of income by similar computations. In any event, General Motors was not in the

---

[4] *E.g.*, *Hans Rees' Sons, Inc.* v. *North Carolina*, Brief of Appellee, p. 19: "In other words, the act having been administered in good faith, the inequalities, if any, complained of by the appellant, were only these which resulted from the operation of a general, though valid, law."

position of Hans Rees' Sons, with separable buying profit, manufacturing profit, and selling profit, and with a single fungible product. Such computations when applied to General Motors' business or any other unitary business would be meaningless, as well as impermissible under *Butler Bros.* v. *McColgan,* 315 U.S. 501, 506-509 (1942).

We cannot emphasize too strongly that the practical effect of the Court of Appeals decision will be to prevent every unitary business of any complexity from proving unconstitutional taxation even where it is obvious that multiple taxation and undue burdens on commerce must result. The Court of Appeals decision will force economic experts to do what they assert they cannot legitimately do: allocate into precise percentages the income of a complex, unitary business that sells in interstate commerce. The decision will place a premium on meaningless or even false computations in an already overly-complex area of the law. We submit that there is no need for such precision when the facts and findings are comparable to those in the instant case.

There is a further point that we believe the Court of Appeals has overlooked in regard to the standard of proof required in apportioning income. In *Hans Rees' Sons,* this Court stated the applicable rule to be that "when the State has adopted a method *not intrinsically arbitrary,* it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases" (283 U.S. at 133; emphasis added), and "evidence may always be received which tends to show that a State has applied a method which, *albeit fair on its face,* operates so as to reach profits which are in no just sense attributable to transactions within

its jurisdiction" (*id.* at 134; emphasis added).[5] We submit that the present case involves a formula which is "intrinsically arbitrary," and which is not "fair on its face". Certainly this is true where, as here, there is the added factor of multiple taxation. The single-factor formulae involved in *Underwood* and *Hans Rees' Sons,* being based on the location of one of the principal factors of production (property), at least had a tendency to allocate income to its source, since the other factors of production would tend to be located where the property was employed. It was necessary, therefore, to demonstrate by proof that such was not the case. Here, on the other hand, the effect of the single-factor formula based on *sales* was to reach the entire net income connected with every sale to a District of Columbia customer, without regard to the location of the factors of production. Only by chance could such a formula ever produce an apportionment approximating a fair distribution of income between the District and the states in which manufacturing and other income-producing activities are carried on. When a formula is of that nature, it should not be necessary to show by "specific percentages" the degree to which the result deviates from a fair apportionment. To hold otherwise would nullify the constitutional protection, for if the type of showing made by General Motors is not valid, an entire group of companies is automatically barred from proving illegality.

There is a final point which we would stress to the Court. The Association feels very strongly that with the states constantly seeking new sources of revenue from corporations, the Court of Appeals decision may

---

[5] See also the Court's two references to an "inherently arbitrary" method of allocation by the State (*id.* at 130, 131).

well signal a shift throughout the country in methods of income allocation. While this assertion is not capable of direct proof, our review of the history of state tax legislation leads us inevitably to this conclusion. The various three-factor formulae previously adopted by the states have been the result not of charity but of the states' conclusion that only by such apportionments can they avoid holdings of unconstitutionality. That is, only by allowing each state its proper due can each state hope to collect at all. But if the states are now told in effect that a single-factor sales formula is both permissible on its face and immune from attacks by any but the most simple business operations, there is little doubt that many states will take advantage of the implied invitation. The result will be extensive burdens on interstate commerce and multiple taxation of the most grievous kind. We therefore respectfully urge the Court to hear and decide the serious questions presented here at this most opportune time.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA,

By LAMBERT H. MILLER
General Counsel

EDWARD R. DUFFY
Associate General Counsel

FRED B. HAUGHT
Assistant Counsel
918 16th Street, N. W.
Washington, D. C. 20006

Attorneys for the National Association of Manufacturers of the United States of America

October, 1964